

**United States Department of Labor
Employees' Compensation Appeals Board**

RONNIE MONTGOMERY, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Memphis, TN, Employer**

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**Docket No. 05-1206
Issued: September 8, 2005**

Appearances:
Ronnie Montgomery, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 9, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated February 4, 2005, denying his emotional condition claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.¹

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained an emotional condition in the performance of duty.

¹ The Board notes that on June 8, 2004 the Office issued a decision denying appellant's request for reconsideration as untimely and failing to establish clear evidence of error. The Board reversed the Office's decision by order dated November 19, 2004 for failure to use the proper standard of review and remanded the case for application of the proper standard.

FACTUAL HISTORY

On December 12, 2002 appellant, a 37-year-old custodian, filed an occupational injury claim alleging that he experienced stress and anxiety as a result of incidents of his federal employment. He claimed that the employing establishment refused to grant him union time to process grievances and was forced to use personal time, thereby causing strain on his relationship with his family. Appellant first became aware that his condition was caused by factors of employment on August 29, 2002 and alleged that his delay in filing the claim was due to his supervisor's refusal to provide him with a claim form when he gave notice of his illness. He submitted no medical evidence in support of his claim.

The record reflects that appellant filed numerous grievances which included allegations of delay and denial of union time; refusal of his supervisor to provide medical treatment and forms to report alleged stress; denial of annual leave; denial of transfer; denial of his request for a change of his schedule; improper policies regarding discipline for safety rule violation; denial of light duty; assignment to duties that are not within his job description; and privacy violations due to improper maintenance of personnel files. Appellant also alleged that the employing establishment harassed and discriminated against black employees, claiming that supervisor B.J. Hughey yelled constantly at employees and once threatened that he would "come down hard" on all employees for the actions of appellant and a coworker. He contended that workers were being denied advancement and proper high-level pay and were subjected to a hostile and unsafe work environment. The record reflects decisions denying as being without merit grievances regarding allegations of denial of union time to process grievances, denial of sick and annual leave, refusal to provide medical attention, harassment and retaliation.

By decision dated May 22, 2003, the Office denied appellant's claim, finding that he had failed to establish that he had sustained an injury. As appellant did not submit any medical evidence in support of his claim, the Office did not evaluate whether appellant had established a compensable factor of employment.

By letter dated May 19, 2004 and received by the Office on May 24, 2004, appellant submitted a request for reconsideration. He submitted a statement elaborating on alleged factors of employment contributing to his emotional condition. Appellant stated that on August 29, 2002 he had been denied union time to process a grievance and paid leave for medical treatment; that he had been harassed for union activity since June 1998; that he had been listed personally in a policy established by Supervisor Stan Ballaud regarding union activities; and that coworker Robert Price provided a statement to the effect that appellant had been subjected to more stressful conditions than other coworkers. Appellant submitted a witness statement dated October 12, 2001 from Johnny Gober, a coworker, indicating that he had heard supervisor Mr. Hughey speak to appellant in an abusive tone of voice. Medical evidence submitted included a report dated September 10, 2002 signed by Dr. Jesse E. McGee, a Board-certified internist, reflecting that appellant's chronic hypertension had been aggravated by his employment and that he was likely to be incapacitated intermittently during the course of a year for periods of one to five days. Appellant also submitted a "return to work" form dated September 4, 2002 and signed by Dr. Roy Johnson, Board-certified in occupational medicine, providing a diagnosis of anxiety and indicating that appellant required time off from work on August 29 and 30, 2002.

By letter dated February 23, 2004, the employing establishment denied the allegation that personal information relating to appellant had been inappropriately released.

By decision dated June 8, 2004, the Office denied appellant's request for reconsideration as untimely and failing to establish clear evidence of error. In a November 19, 2004 decision, the Board found that appellant's request for reconsideration was timely and remanded the case for application of the proper standard of review.²

By decision dated February 4, 2005, the Office denied the claim, finding that appellant's anxiety condition did not arise from a compensable factor of employment in the performance of duty.

LEGAL PRECEDENT

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment, but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.³ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.⁴

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.⁵ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁶

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician, when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁷ If a claimant does implicate a factor of

² See *Ronnie Montgomery*, Docket No. 04-1871 (issued November 19, 2004).

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); see also *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Lori A. Facey*, 55 ECAB ____ (Docket No. 03-2015, issued January 6, 2004). See also *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁶ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁷ See *Lori A. Facey*, *supra* note 5. See also *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁸

ANALYSIS

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Office denied appellant's claim on the grounds that he failed to establish compensable factors of employment resulting in his diagnosed condition. The Board must initially review whether incidents and conditions of employment alleged by appellant are covered employment factors under the terms of the Act.

To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁹ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁰ In the present case, appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by his supervisors.¹¹ Witness statements reflect the opinion of a coworker that appellant had been subjected to more stressful conditions than other coworkers and alleged that appellant's supervisor spoke to him in an abusive tone of voice. These statements lack sufficient detail to establish that harassment did occur or to substantiate appellant's allegations. While the Board has recognized the compensability of verbal abuse in certain situations, this does not imply, however, that every statement uttered in the workplace will give rise to coverage under the Act.¹² In the instant case, the record does not contain an allegation that a specific abusive statement was made to appellant at a particular time and place. The Board has held that the mere fact that a supervisor or employee may raise his voice during the course of a conversation does not warrant a finding of verbal abuse.¹³ Without a detailed description of the specific statements made during the conversation between appellant and his supervisor, the Board finds that it does not constitute a compensable employment factor.¹⁴ Moreover, while the supervisor's tone of voice was claimed to be inappropriate, it was not alleged to constitute harassment. Appellant's

⁸ *Id.*

⁹ See *Lori A. Facey*, *supra* note 5. See also *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁰ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹¹ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹² See *Leroy Thomas, III*, 46 ECAB 946, 954 (1995).

¹³ *Carolyn S. Philpott*, 51 ECAB 175, 179 (1999).

¹⁴ *Joe M. Hagewood*, 56 ECAB ____ (Docket No. 04-1290, issued April 26, 2005).

allegations that he had been listed personally in a policy established by Mr. Ballaud regarding union activities and other allegations of discrimination and retaliation are unsubstantiated. Appellant has provided no evidence nor cited specific instances to support his general allegation that he had been harassed for union activity since June 1998. Appellant has not established a compensable employment factor under the Act with respect to these above-described allegations of harassment and discrimination.

The record reflects that appellant filed numerous grievances. Grievances and Equal Employment Opportunity complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.¹⁵ Where an employee alleges harassment and cites specific incidents, the Office or other appropriate fact finder must determine the truth of the allegations. The issue is not whether the claimant has established harassment or discrimination under Equal Employment Opportunity Commission standards. Rather, the issue is whether the claimant under the Act has submitted sufficient evidence to establish a factual basis for the claim by supporting his or her allegations with probative and reliable evidence.¹⁶

In the present case, appellant has not attributed his emotional condition to the performance of his regular duties as a custodian or to any special work requirement arising from his employment duties under *Cutler*, nor has appellant implicated his workload as a custodian as having caused or contributed to his emotional condition. The Board finds that appellant's allegations of improper disciplinary actions; wrongful denial of union time to process a grievance; denial of annual and sick leave; denial of transfer; denial of his request for a change of his schedule; improper discipline for safety rule violations; denial of light duty; and assignment to duties that are not within his job description, relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.¹⁷ Although the aforementioned activities are generally related to the employment, they are administrative functions of the employer and not duties of the employee.¹⁸ The Board has found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁹ However, appellant has not submitted sufficient evidence to show that the employing establishment committed error or abuse with respect to these matters. Similarly, appellant's unsubstantiated allegation that his supervisor failed to provide him with a claim form does not rise to the level of abuse. Appellant has not established a compensable employment factor under the Act with respect to administrative matters.

¹⁵ See *James E. Norris*, 52 ECAB 93 (2000). See also *Parley A. Clement*, 48 ECAB 302 (1997).

¹⁶ See *James E. Norris*, *supra* note 15. See also *Michael Ewanichak*, 48 ECAB 354 (1997).

¹⁷ See *Lori A. Facey*, *supra* note 5. See also *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

¹⁸ *Id.*

¹⁹ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained an emotional condition in the performance of duty.²⁰

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he sustained an emotional condition in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 4, 2005 is affirmed.

Issued: September 8, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

²⁰ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record. *See Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).